STATE OF MICHIGAN

COURT OF APPEALS

DORIS PERNELL,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee,

and

QBE INSURANCE CORPORATION and IPA INSURANCE PROGRAM ADMINISTRATORS, L.L.C.,

Defendants.

UNPUBLISHED
December 2, 2008

No. 279825
Wayne Circuit Court
LC No. 05-519094-NF

DORIS PERNELL,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant,

and

QBE INSURANCE CORPORATION and IPA INSURANCE PROGRAM ADMINISTRATORS, L.L.C.,

Defendants.

No. 279837
Wayne Circuit Court
LC No. 05-519094-NF

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

In this insurance dispute, the trial court ruled that defendant Allstate Insurance Company was liable for payment of plaintiff's personal injury protection (PIP) benefits of $28,445, less a setoff of $7,500 previously paid by defendant QBE Insurance Corporation. The court denied plaintiff's motion for no-fault attorney fees under MCL 500.3148. Plaintiff and defendant Allstate both appeal as of right. We reverse the trial court's denial of plaintiff's request for no-fault attorney fees and remand for a determination of reasonable attorney fees against Allstate, but affirm in all other respects.

I. Priority Under MCL 500.3114

In their respective appeals, plaintiff and Allstate both dispute whether either QBE, the insurer of the vehicle plaintiff was operating when she was injured, or Allstate, the insurer under a policy issued to plaintiff's mother, a resident relative, have priority to pay plaintiff's PIP benefits under MCL 500.3114. This issue involves the application of MCL 500.3114, which is a question of law that we review de novo. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007); *Farmers Ins Exch v AAA of Michigan*, 256 Mich App 691, 694; 671 NW2d 89 (2003).

MCL 500.3114(1) provides, in pertinent part:

> Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. . . .

Under the no-fault act, insurance policies for the injured person's household are first in order of priority of responsibility for payment of no-fault benefits. Therefore, a person who sustains accidental bodily injury while the occupant of a motor vehicle must first look to no-fault insurance policies within his or her household for no-fault PIP benefits. *Dobbelaere*, *supra* at 530.

However, the Legislature expressly provided exceptions to the general rule, including the exception in § 3114(2), which provides that "[a] person suffering accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers shall receive the personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle." Section 3114(2) relates to commercial situations. By enacting § 3114(2), the Legislature intended to place the burden of providing no-fault benefits on the insurers of commercial vehicles, rather than on the insurers of the injured individuals. *Farmers Ins Exch*, *supra* at 698. Such a scheme allows for predictability; coverage in the "commercial" setting will not depend on whether the injured individual is covered under another policy. *Id*.

A "primary purpose/incidental nature test" is to be applied to determine whether at the time of an accident a motor vehicle was operated in the business of transporting passengers pursuant to § 3114(2). *Id*. at 701. In other words, § 3114(2) applies if the driver's transportation of passengers for hire was the primary function or purpose in operating the vehicle. *Id*.

The vehicle in this case was used in the course of plaintiff's employment of transporting passengers for hire, which was her primary purpose in operating the vehicle. Therefore, as between Allstate and QBE, the insurer of the vehicle, QBE, was first in priority to pay plaintiff's no-fault benefits. QBE also has priority under MCL 500.3114(3), which provides:

> (3) An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.

As with § 3114(2), § 3114(3) relates to commercial situations, and the same rationale for it exists. *Farmers Ins Exch*, *supra* at 698. Section 3114(3) covers situations involving active, existing employment relationships. *Vitale v Auto Club Ins Ass'n*, 233 Mich App 539, 543; 593 NW2d 187 (1999).

Because § 3114(1) expressly indicates that the resident relative's policy applies, "except as provided" in subsections (2) and (3), and because subsections (2) and (3) mandate that the insurer of the motor vehicle has priority in those situations, QBE was first in priority to pay plaintiff's no-fault benefits.

But even though we conclude that Allstate was not first in priority, the trial court did not err in denying its motion for summary disposition. The priority dispute did not excuse Allstate from paying plaintiff and then seeking reimbursement from QBE. See *Bloemsma v Auto Club Ins Ass'n*, 174 Mich App 692, 697; 436 NW2d 442 (1989); *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 12; 369 NW2d 243 (1985). The trial court correctly ruled that Allstate should have paid plaintiff's PIP benefits and then sought reimbursement from QBE. *Id*. at 12-13. Accordingly, we affirm the trial court's judgment holding Allstate liable for payment of plaintiff's PIP benefits.

In light of our decision, it is unnecessary to address plaintiff's argument that the trial court erred in permitting Allstate to amend its affirmative defenses. Further, we decline to review the trial court's award of penalty interest under MCL 500.3142, because this issue was decided in plaintiff's favor and Allstate has not challenged that ruling on appeal.

II. Attorney Fees

Plaintiff argues that the trial court erred in denying her motion for no-fault attorney fees under MCL 500.3148(1), which provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

Benefits are "overdue" if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of the loss sustained. MCL 500.3142.

The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 629; 550 NW2d 580 (1996). An insurer's delay in making payments under the no-fault act is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. *Ross v Auto Club Group*, 481 Mich 1, 11; 748 NW2d 552 (2008). Whether attorney fees are warranted under the no-fault act does not depend on whether coverage is ultimately determined to exist, but on whether the insurer's initial refusal to pay was unreasonable. *Id*.

As previously indicated, a priority dispute among insurers will not excuse a delay in making timely payment. *Bloemsma*, *supra* at 697; *Darnell*, *supra* at 12. To delay paying a claim to decide the question of which of two insurers is legally responsible to pay would defeat the purpose of MCL 500.3148(1). *Bach v State Farm Mut Auto Ins Co*, 137 Mich App 128, 132; 357 NW2d 325 (1984). When the only question is which of two insurers will pay, it is unreasonable for an insurer to refuse payment of benefits. *Regents of Univ of Michigan v State Farm Mut Ins Co*, 250 Mich App 719, 737; 650 NW2d 129 (2002).

In this case, because Allstate's sole basis for denying plaintiff's claim was that another insurer had priority, it acted unreasonably in refusing to pay plaintiff's claim. Because benefits were overdue and Allstate acted unreasonably, the trial court erred by denying plaintiff's motion for attorney fees. Accordingly, we remand for an award of reasonable attorney fees under MCL 500.3148(1).

III Worker's Compensation Setoff

Although plaintiff was injured during the course of her employment, she was unable to collect worker's compensation benefits because her employer did not have worker's compensation coverage. As our Supreme Court determined in *Perez v State Farm Mut Auto Ins Co*, 418 Mich 634, 638-639; 344 NW2d 773 (1984), worker's compensation benefits payable but not paid are not required to be set off pursuant to MCL 500.3109(1). Although Allstate argues that *Perez* was wrongly decided, this Court is required to follow that decision. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253, remanded on other grounds 467 Mich 888 (2002).

Affirmed in part, reversed in part, and remanded for an award of reasonable attorney fees under MCL 500.3148(1). We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Patrick M. Meter